than the seaworthiness or otherwise of the vessel in question, and its propriety or otherwise for the purpose for which a licence is sought, that is to say, for the conveyance of passengers or cargo as the case may be.

Here, whatever construction be placed upon the Port Officer's letter to the Applicant Company dated 23rd December it is clear that the Port Officer was in fact influenced to exercise his discretion in the way of refusing rather than granting a licence by some other consideration, and it is immaterial, for the purpose of the present proceedings, whether that consideration was some sort of instruction he had received from the Perak State Executive Council, or whether it was some sort of consideration relating to the amount of traffic that was desirable in the Dindings estuary, or whether, as was suggested, it was a desire to obviate feelings of unfriendliness among parties engaged in water transport.

That being so, the Applicant is entitled to ask the Court in one way or another to intervene.

The ordinary course for me to pursue would be to make an order *nisi* returnable at some future date.

In the circumstances of the present case, however, I fail to see that any useful purpose would be served by taking such a course.

The relevant facts in the Applicant's affidavit are not, I gather, disputed, and I see no reason why I should not draw the inference from these facts that the boats in question have been examined by the Port Officer and that he has thought they are seaworthy and proper for the conveyance of passengers. That he thinks them to be seaworthy, I think, follow from their having in fact been licensed during the year 1953 and from the fact that he is prepared to license them as cargo boats in 1954. That he thinks them proper for the conveyance of passengers, I think, follows from the fact that they were licensed for the conveyance of passengers up till the end of December. The unavoidable corollary is that he is under a duty to issue the licences asked for and it is this he has refused to do.

In the circumstances there will be an absolute order.

I will make an order that the respondent do cause boats in question to be licensed as passenger boats for the year 1954 subject to such conditions as he may see fit to impose under section 475(3) of the Merchant Shipping Ordinance and do issue the necessary licences forthwith.

(*Note*:—His Lordship then refused an application on the part of the respondent for a stay of execution and ordered that judgment be entered against the respondent for the taxed costs of the proceedings.)

Order accordingly

Solicitors for the petitioners: *Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. THUM SOO CHYE.

[A. Cr. J. (Buhagiar, J.) February 12, 1954]

[Ipoh — Criminal Appeal No. 1 of 1954]

Evidence Ordinance, 1950, ss. 24 & 80 — Confession — Admissibility of confession — Criminal Procedure Code (Cap. 6), s. 115(iii).

In this case at the trial the learned President had ruled that the alleged confession made by the appellant to a Magistrate was inadmissible in evidence. The Public Prosecutor appealed on the following grounds: (a) that the learned President was in error in holding that the statement was not duly made to the Magistrate under section 115 of the Criminal Procedure Code; (b) that the learned President was in error in holding that the presumptions under section 80 of the Evidence Ordinance did not apply to this case and (c) that the learned President should have held that the alleged irregularity in conforming to section 115(iii) of the Criminal Procedure Code was not a ground for excluding the statement in view of section 420 of the Criminal Procedure Code.

Held: (1) on the facts of the case the statement was made in accordance with law, and the learned President was wrong in holding that the presumptions under section 80 of the Evidence Ordinance 1950 did not apply; (2) section 80 of the Evidence Ordinance only raises a presumption that the confession was duly taken and does not raise any presumption of the voluntary nature of the confession; (3) notwithstanding that the recording Magistrate has certified that the confession was voluntarily made it is incumbent on the Court when the spontaneity and voluntary nature of the confession is impugned to inquire into the nature of the confession and see whether it was voluntary or not; the Court is not bound by the opinion of the recording Magistrate and if upon the evidence before the Court the confession appears to have been caused by inducement it would be inadmissible.

CRIMINAL APPEAL from Sessions Court.

I. Talog Davies (Federal Counsel) for the appellant.

Eusoffe Abdoolcader for the respondent.

Cur. Adv. Vult.

The facts and arguments appear sufficiently from the judgment.

Buhagiar, J.: —This is an appeal by the Public Prosecutor against the decision of the learned President of the Sessions Court acquitting and discharging the respondent on two charges for offences under section 62 of the Post Office Ordinance, 1947 (No. 34 of 1947).

For the purposes of this appeal it is sufficient if I summarize the facts as follows:—

The respondent is an officer of the Postal Services Department, that is, a packer. In September 1953 the Assistant Controller of Posts, Perak, received two written complaints about two registered letters not having been delivered. On receipt of these two complaints he started making certain inquiries. On the 7th October, 1953, he sent for the respondent who came to his office at about 11 a.m. The respondent made a statement. Evidence was given to show the circumstances under which this statement was made. After this statement was made the Assistant Controller of Posts, Perak, proposed to make a report to the Police and at 2.00 p.m. went with the respondent to the Central Police Station; there he was referred to Inspector Petrus, whom he contacted at 3.30 p.m. and to whom he explained the whole matter, made a report, and handed the respondent. Inspector Petrus interrogated the respondent and at about 4.00 p.m. took him to see Captain Salleh, the Magistrate, who was then sitting in Court. Inspector Petrus saw the Magistrate at about 4.40 p.m.: he told him that the respondent wanted to make a confession and left the respondent with the Magistrate. The Magistrate recorded a statement made by the respondent under section 115 of the Criminal Procedure Code.

At the trial the prosecution did not at once tender the alleged confession made to the Magistrate and asked the Court, under section 80 of the Evidence Ordinance, 1950, to apply the presumptions contained in that section; instead the prosecution produced the Magistrate as a witness to give evidence as to what he had recorded in the way of a confession. Counsel for the respondent objected to the admissibility of the statements made to the Assistant Controller of Posts, Perak, and to the Magistrate, and after hearing the evidence the learned President held both those statements were inadmissible. The learned President was not satisfied with the other evidence adduced by the prosecution and acquitted and discharged the respondent.

From this decision the Public Prosecutor appealed on the following grounds:—

(a) That the learned President was in error in holding that the evidence of Prosecution Witness No. 1 (the Magistrate) shewed that the statement was not "duly made" by the Respondent;

(b) That the learned President was in error in holding that section 80 of the Evidence Ordinance did not apply to this case;

(c) That the learned President should have held that the alleged irregularity in conforming to section 115(iii) of the Criminal Procedure Code was not a ground for excluding the statement in view of section 420 of the Criminal Procedure Code.

The learned President declined to admit the statement made by the respondent to the Magistrate on the following grounds as he gave them in his grounds of judgment:—

"In the result I declined to admit under section 80 Evidence Ordinance the statement recorded by the Magistrate as I could not consider it had been recorded "in accordance with law": and having taken evidence under section 420 Criminal Procedure Code I was not satisfied that the statement recorded had been "duly made" by the accused. In my opinion the effect of the inducement offered in the morning by PW2 had not been shown to have been removed by the late afternoon: and finally the method of recording the statement in the late afternoon was defective and prejudicial to accused."

The relevant provisions of law for consideration are sections 115 and 420 of the Criminal Procedure Code and sections 80 and 24 of the Evidence Ordinance, 1950 (No. 11 of 1950).

The presumption under section 80 of the Evidence Ordinance, 1950, arises when "a statement or confession by any prisoner or accused person" is "taken in accordance with law." Sub-section (ii) of section 115 of the Criminal Procedure Code requires that a confession or statement shall be recorded in full and sub-section (iii) of the same section requires that a statutory certificate shall be recorded at the foot of the record of confession to the effect *inter alia* that the confession or statement made was read over to the person making it and admitted by him to be correct. To deal with the second point first, that is, sub-section (iii). The Magistrate deposed that he wrote the certificate required by sub-section (iii) before he had actually read over the statement to the respondent. It is not clear from the evidence whether he simply wrote down the certificate and signed it before actually reading over the statement to the respondent or whether he simply wrote down the certificate before so doing and signed it after the statement had been read over to the respondent.

The Magistrate said: "I wrote the certificate prescribed under section 115(iii) of the Criminal Procedure Code at once—after I had recorded his statement: I read over the statement after recording the certificate: he had not then signed his statement. There were no alterations suggested by the accused to this statement."

The learned President held that in so doing the Magistrate was not complying with the provisions of sub-section (iii) of section 115 of the Criminal Procedure Code. I cannot agree with this opinion, even assuming that the Magistrate had written *and signed* the certificate before the statement was read over to the respondent. The important point is: Does the record reflect the facts? Did the Magistrate read

over the statement to the person making it and did the person making it admit it to be correct? If the answer is in the affirmative then there is no illegality or irregularity, or, if there is an irregularity, it is a defect of no serious character which can be cured by section 420 of the Criminal Procedure Code.

Sub-section (ii) of section 115 of the Criminal Procedure Code requires that "the statement or confession shall be recorded in full in writing by the Magistrate to whom it is made." The learned President held that the statement made by the respondent was not recorded "in full". The statement was made by the respondent and recorded by the Magistrate in the English language. The services of an interpreter were sought but at that time, 4.40 p.m., no one was available. The respondent volunteered to make the statement in English; his English was not good and the Magistrate had to put a number of questions to the respondent to elicit his meaning. These questions were not recorded. In one part of his deposition the Magistrate said that he agreed that it was unfortunate that an interpreter was not available but he finished up by saying "I am satisfied that what I recorded was what accused meant: the situation did not demand an interpreter." It may be that in writing down the statement the Magistrate did not employ the actual words used by the respondent and that the statement as written down shows an improvement in language on the words used by the respondent. Whatever was the standard of the respondent's English, it is clear from the evidence of the Magistrate that he and the respondent understood each other clearly and the statement as recorded by the Magistrate contains all the facts as given by the respondent. I do not consider that a statement can be said not to be recorded in full simply because the statement is not the *ipsissima verba* of the person making it or because in recording the statement the Magistrate found it necessary to put questions to elicit the meaning of certain words used by the person making the statement and such questions and the answers thereto were not recorded. In such cases the position of a Magistrate is similar to that of an interpreter who is translating into English a statement made by a person in another language and in doing so he adopts words in English which, in his opinion, best reflect what the person means to say. There is no evidence whatsoever in the present case that the Magistrate either added or omitted anything the respondent said to him: he simply endeavoured to put on paper what the respondent wished to say. I may also add that in this case the Magistrate took the precaution when using a phrase or a word not used by the respondent to ask the respondent whether that was what he meant to say. I do not consider, therefore, that, on this ground, it can be held that the statement was not recorded "in full".

For the above reasons I hold that the statement was made "in accordance with law" and the learned President was wrong in holding that the presumptions under section 80 of the Evidence Ordinance, 1950, did not apply.

On the grounds set out in the Petition of Appeal, the appeal would succeed; but the learned President held also that that statement was not admissible on the ground that the inducement offered to the respondent in the morning when he made the statement to the Assistant Controller of Posts, Perak, had not been removed when the respondent made the statement to the Magistrate. At the trial the prosecution tendered in evidence a statement made by the respondent at 11 a.m. to the Assistant Controller of Posts. After hearing evidence the learned President held (and rightly so) that that statement was inadmissible on the grounds "that it was not a spontaneous voluntary effort: that it was made after inducement by a person in authority; and finally that it was a 'joint effort' between respondent and P.W. 3".

The provisions of section 80 are provisions dealing only with the burden of proof. When a document purporting to be a confession taken by a Magistrate is put in, the presumption is that the document is genuine and the signature is that of the Magistrate purporting to sign it. It is genuine in that sense: but it may be that in taking the statement or confession the Magistrate did not make a real endeavour to ascertain the voluntary nature of the confession by appropriate questions. Section 80 does not make admissible any particular kind of evidence; it simply dispenses with formal proof and gives legal sanction to the maxim *omnia presumuntur rite esse acta*. The language used in this section shows that *prima facie* a confession duly recorded as required by law is to be deemed relevant; it being assumed that a confession is formally relevant, the question of admissibility of confession is to be decided on a reference to section 24 of the Evidence Ordinance, 1950. As the alleged confession was not tendered by the prosecution at the trial there is not on record the written memorandum taken by the Magistrate preliminary to recording the confession. The steps taken by the Magistrate to ensure that the respondent wanted to make a confession voluntarily appear from the deposition of the Magistrate; this shows that the Magistrate put seven questions to the respondent; what some of these questions were and the answers thereto appear in the

deposition of the Magistrate. Others may or may not be formal questions, such as "What is your name"? but these are not on record. There is evidence of questions and answers recorded by the Magistrate in the following terms :—

Q. Why do you wish to see me?
A. Because I wish to make a confession.
Q. Have you any complaints to make against the Police?
A. I have none.
Q. Has anyone told you to make this confession to me?
A. No. I want to make a confession of my own will voluntarily.
Q. Did the Police promise anything to your advantage?
A. None whatever and no one induced me.

It appears that the Magistrate had no knowledge that the respondent had been, since 11 a.m., either with superior officers of the Postal Services Department or with the Police and that he had had no food (though he might have gone to have his lunch if he wanted to do so at least since then) or that the respondent had earlier made a statement to a person in authority which, as it turned out to be, was inadmissible being the result of an inducement. It is also clear that the Magistrate asked him no questions on these matters.

Now, in order to ensure the voluntariness of a confession the questioning of a person, before he makes the confession, forms a factor, the importance of which can seldom be over-estimated. It cannot be too strongly enjoined that the Magistrate must question the person with a view to discovering whether the prisoner confesses voluntarily, and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirements not being satisfied by putting a few formal questions.

When there is a presumption under section 80 of the Evidence Ordinance, 1950, that the confession was "duly taken", the confession proves itself without the necessity of calling the Magistrate who recorded it; but there is no presumption as to the voluntary nature of the confession and it is the duty clearly incumbent on the Court, when the spontaneity and voluntary nature of the confession is impugned, to inquire into the nature of the confession and see whether it was voluntary or not, notwithstanding that the recording Magistrate attached at its foot the certificate prescribed by section 115(iii) of the Criminal Procedure Code. The recording Magistrate may have had ample justification for forming the opinion that the confession was voluntary but the Court is not bound by that opinion and if upon evidence before the Court the confession 'appears' to have been caused by inducement it is inadmissible.

Under section 24 of the Evidence Ordinance, 1950, a confession is irrelevant if the making of the confession *appears* to the Court to have been caused by an inducement, etc., and such inducement, etc. is sufficient *in the opinion of the Court* to give the accused person grounds which would *appear to him* reasonable for supposing that by making it he would gain any advantage, etc. The section is worded in a manner which admits the exercise of the fullest discretion by the Court. The word "appears" indicates a lesser degree of probability than "proof" as defined in section 3; but, as pointed out in *Sarkar on Evidence*, 8th Edition at page 190, this does not mean "that the requirements of a prudent man which have been adopted in section 3 as an appropriate concrete standard of proof, should be wholly departed from in considering the voluntary or involuntary nature of a confession ..... All that is meant is that as "proof" of inducement is difficult or in many cases impossible of attainment in a matter like this, the discretion of the Court is unfettered by the concrete standard of proof which is necessary in other cases. The Court is free to form its conviction from a scrutiny of the evidence and surrounding circumstances, even if the basis of such conviction be not what is strictly called "proof" ..... the Court is charged with the delicate task of probing the facts which were passing in the mind of the accused at the time of making the confession."

It is indeed difficult to lay down a hard and fast rule as to the sufficiency of the circumstances which would make the confession irrelevant under the provisions of this section; that must depend on the circumstances of each case.

I do not think that it is improper for a higher court to go into the whole evidence and decide whether a lower court was right or wrong in admitting or excluding a confession. A confession may have been admitted or excluded on circumstances which appear to the higher court to be wanting and in such cases the decision of the lower court may properly be overruled. In the present case, however, there are circumstances from which the learned President could form an opinion as to the state of mind of the respondent at the time he appeared before the Magistrate to make a statement and as to the voluntary nature of such statement, and I am in no better position than the learned President to scrutinize those circumstances. I do not therefore propose to interfere with the opinion formed by the learned President and with the decision he arrived at.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the respondent: *Ong Huck Lim.*